IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE COMBS	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 99-3812
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA, DAVID W. HORNBECK, YVONNE JONES, JOSEPH ROBERTS, BEVERLY BROWN, DANTE JOSIE, WILLIAM PORTER AND ERIC WALTERS	:	
Defendants.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J. October 26, 2000

Clarence Combs ("Plaintiff") asserts a claim under 42 U.S.C. § 1983 against defendant School District of Philadelphia ("School District") and several individual defendants in their official capacities, Joseph Roberts ("Roberts"), Beverly Brown ("Brown"), Yvonne Jones ("Jones"), and David W. Hornbeck ("Hornbeck"), alleging that they violated his constitutionally protected liberty interest in being secure in his personal integrity and free from unwarranted assaults and other intrusions of his physical person. Plaintiff seeks damages.

Presently before this Court is a motion for summary

judgment on behalf of defendant School District of Philadelphia and the individual defendants, Joseph Roberts, Beverly Brown, Yvonne Jones and David W. Hornbeck. For the reasons set forth below, the defendants' motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

Three students, Dante Josie ("Josie"), William Porter ("Porter") and Eric Walters ("Walters") attacked Plaintiff, a fellow student, in the hallway at Overbrook High School ("Overbrook") during a class change. Plaintiff suffered a broken jaw and alleges psychological injuries as a result of this incident.

Plaintiff contends that he was engaged in a conversation with Josie, Porter and Walters when they assaulted him. This incident occurred in view of a school surveillance camera, and even though no one was monitoring the camera at the time of the assault, the video tape demonstrates that a school police officer responded to the situation within one minute. Plaintiff alleges that Non-Teaching Assistant Brown failed to respond promptly to the brawl. Brown, who had been patrolling the hallways in accordance with her job responsibilities, came upon the fight and allegedly stated that she was not going to intervene. Nonetheless, she apprehended two of the fleeing

assailants and then called for assistance.

In May 1999, Overbrook suffered from maladies that have become commonplace in urban high schools. The environment was often unruly and at times violent. The School District sought to address these problems by installing video cameras and employing school police officers and non-teaching assistants to help maintain discipline.

Some school employees indicated in their deposition testimony that Josie, Porter and Walters were known "hallwalkers" and were considered disruptive students prior to the incident with Plaintiff. Moreover, Josie attacked a female student at least fifteen minutes prior to his assault on Plaintiff. This student, with Non-Teaching Assistant Brown's assistance, reported the incident to the school authorities. School employees then sought to apprehend Josie and found him assaulting Plaintiff.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving

party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1982). A "mere scintilla of evidence" in support of the non-moving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby , 477 U.S. at 252. Therefore, it is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

Defendants move for summary judgment on the claims against both School District and the individual defendants.

A. CLAIMS AGAINST SCHOOL DISTRICT

In general, the state owes no affirmative duty to protect citizens from the tortious acts of private individuals. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989). However, the Third Circuit has held that two exceptions may apply: (1) the special relationship exception and (2) the state-created danger exception. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3rd Cir. 1997).

Plaintiff argues both of these exceptions, and while he fails to provide sufficient evidence under the first theory, he succeeds under the second one. Therefore, this Court grants the motion for summary judgment as to the claim that a special relationship exists and denies the motion for

summary judgment on the grounds that the state created the danger that led to Plaintiff's injury.

1. SPECIAL RELATIONSHIP

The Supreme Court has held that where a special relationship exists between a citizen and the state, the state must protect that individual's constitutional rights even from actions of third parties. See DeShaney, 489 at 200. The Court in DeShaney found a special relationship where "the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety . . . ." Id.

To establish this relationship, the Third Circuit also has required that the state exercise physical custody and control over an individual. See D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1369-71 (3rd Cir. 1992). More specifically, the Court in D.R. asserted that compulsory school attendance does not constitute custody within this analysis as the parents remain the primary caretakers throughout the school day. 972 F.2d at 1370-72. Therefore, the special relationship does not exist between students and a school district.

Defendants rely on the holding in D.R. to support their

motion for summary judgment as to this claim. However, Plaintiff fails to respond to this argument or to offer any support of a special relationship in its briefs opposing the motion for summary judgment. Therefore, as Plaintiff fails to meet his burden of proof, this Court grants the motion for summary judgment as to the special relationship theory.

2. **STATE-CREATED DANGER**

The second exception allows a state to be held responsible for the conduct of a third party where the state creates the circumstances under which the harm occurs. The Third Circuit has determined that liability under the "state-created danger" exception may attach where:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Kneipp v. Tedder, 95 F.3d 1199, 1208 (3rd Cir. 1996).

In evaluating these four prongs, the Court also must find that the defendants' actions meet the standard of fault necessary to trigger § 1983 liability. Here, the proper standard is "deliberate indifference."[1] See County of Sacramento v. Lewis, 523 U.S. 833, 848-49 (1998).

This Court believes that Plaintiff provides evidence sufficient to survive summary judgment as to prongs one,

three and four of the Kneipp test. However, prong two requires the following additional analysis.

As the risk of harm to students attending Overbrook is undisputed, the issue here is whether evidence has been presented that suggests School District may have acted with willful disregard for the severity of that risk. School District contends that it took precautions to minimize the violence at Overbrook and sought to best allocate its resources to preserve discipline. Nonetheless, Plaintiff has met his burden by demonstrating that there may have been significant gaps in the training and execution of the school procedures that may have precipitated Plaintiff's injury. Therefore, this Court denies summary judgment as to municipal liability under the state-created danger theory.

3. POLICY, PRACTICE AND CUSTOM

Plaintiff brings another § 1983 claim against School District and argues under the two available theories that the municipality's policy, practice or custom caused a violation of Plaintiff's rights. Under the first theory, Plaintiff asserts that School District acted unconstitutionally pursuant to government policy, practice or custom and contributed to his injury. See Monell v. New York City Dept. of Social Serv., 436 U.S. 658, 658 (1978). As to the second theory, Plaintiff contends that inadequate training of School District employees also caused his

injury.

Defendants moved for summary judgment on both grounds. Plaintiff fails to provide sufficient support for the first theory but succeeds on the second. Therefore, this Court grants the motion for summary judgment in part and denies it in part.

To establish a claim under the first theory, Plaintiff must demonstrate that the policy or custom was the "moving force" behind the unconstitutional act. See Cannon, 86 F.Supp.2d at 472 (citing Board of the County of Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 404 (1997)). Plaintiff offers examples of two different types of conduct to support this assertion. First, he argues that School District employees violated School District procedures resulting in his injury. For instance, he alleges that Brown did not request security assistance as soon as she encountered the fight and therefore aggravated his injury. However, Brown's compliance or noncompliance with this policy or procedure did not precipitate Plaintiff's beating. Therefore, it did not bear so significantly on the situation as to constitute a "moving force" in the incident.

Secondly, Plaintiff argues under the holding in Maxwell v. Sch. Dist. of the City of Philadelphia, 53 F.Supp.2d at 793-94, that the actions of defendants, specifically those of the school police officers and non-teaching assistants,

constituted School District policy, and these "policies" led to Plaintiff's injury. Even if the School District employees' actions should be considered a policy, custom or practice, this Court finds that they did rise to the level that they were the moving force behind Plaintiff's injury. Therefore, liability does not attach under this theory.

The second theory for establishing liability on the grounds of government policy, practice or custom applies where ineffective training is an underlying cause of the injury. See City of Canton v. Harris, 489 U.S. 378, 379 (1989); see also Cannon, 86 F.Supp.2d at 472. Plaintiff contends that defendants failed to adequately train employees in procedures for swiftly apprehending violent students and for monitoring student behavior. Absent these alleged inadequacies, defendants' employees may have been more equipped to respond to the student defendants' aggressiveness and may have apprehended them before they had an opportunity to harm Plaintiff. Moreover, with better training, defendants' employees may have been able to eliminate the environment that placed Plaintiff at risk and ultimately led to his injury. Plaintiff provides sufficient evidence creating a genuine issue of material fact as to whether this potentially inadequate training affected the incident that gave rise to Plaintiff's injury. Therefore, the motion for summary judgment under this theory is denied.

B. CLAIMS AGAINST INDIVIDUALS ACTING IN OFFICIAL CAPACITY

In addition to alleging that School District violated his constitutional rights, Plaintiff contends that while acting in their official capacities, the individual defendants, School Police Officer Joseph Roberts, Non-Teaching Assistant Beverly Brown, Principal Yvonne Jones, and Superintendent David Hornbeck, infringed his constitutional rights. This Court disagrees.

To establish a claim against an individual defendant, Plaintiff must demonstrate that the defendants' conduct satisfied the same four-prong Kneipp test that was applied to the municipality. However, the four prongs should be analyzed under a different standard.[2] Here, the defendants' conduct must shock the conscience.[3]

This Court believes that Plaintiff failed to meet at least one prong of the Kneipp test for each claim against the individual defendants. Moreover, Plaintiff failed to provide evidence that any of the defendants' conduct "shocked the conscience." For these reasons, this Court grants the motion for summary judgment as to the individual defendants.

a. **SCHOOL POLICE OFFICER ROBERTS**

Plaintiff provides insufficient evidence that Roberts

treated the danger to Plaintiff with willful disregard, and, therefore, he fails to establish the second prong of the Kneipp test. The second prong of Kneipp requires a demonstration of willful disregard as to Plaintiff's plight. The Third Circuit in Morse v. Lower Merion Sch. Dist. concluded that willful disregard is a "willingness to ignore a foreseeable danger or risk." 132 F.3d at 910. To satisfy this prong, Plaintiff alleges that Roberts did not enter into the melee and disperse the fighting students. However, to support this contention, Plaintiff only offers his own deposition testimony.

To survive a motion for summary judgment, the nonmoving party must establish a dispute of material fact by providing evidence that is more than "bare assertions, conclusory allegations or suspicions." See Fireman's Ins. Co., 676 F.2d at 969. This Court believes that Plaintiff's own testimony, where he recounts the alleged remark of his relative, without providing additional substantiating evidence, does not meet the standard for summary judgment. Therefore, this Court grants summary judgment in favor of Roberts.

b. **NON-TEACHING ASSISTANT BEVERLY BROWN**

Plaintiff fails to provide sufficient evidence to establish the fourth prong of the Kneipp analysis or to demonstrate that Brown's behavior shocked the conscience.

Therefore, this Court grants the motion for summary judgment as to this claim against Brown.

To meet the fourth prong, the relevant conduct by the state actor may be either an affirmative act or an omission. See Morse, 132 F.3d at 915. Plaintiff alleges that Brown did not intervene in the fight between the student defendants and Plaintiff and by this omission created the opportunity for injury to Plaintiff. However, as in the claim against Roberts, the only evidence Plaintiff offers to establish this allegation is his own deposition testimony in which he relates an unsubstantiated statement made by his cousin. This evidence is insufficient to meet the level required to survive summary judgment.

Moreover, Brown's behavior does not constitute nonfeasance of the level that a reasonable factfinder would believe shocks the conscience. Plaintiff offers evidence that Brown waited to call for security assistance until after she apprehended the student defendants, thereby creating the opportunity for harm. The Third Circuit adopted the Supreme Court's analysis from DeShaney in which it held that nonfeasance by state functionaries does not rise to the level of a constitutional violation where a school official "was aware of suspicious activity and failed to investigate." D.R. at 1369. Brown's behavior here was even less egregious than that described in DeShaney, as her

behavior did not constitute complete nonfeasance. Therefore, her judgment call, as undesirable as it may have been, did not rise to the level that it shocked the conscience.

c. PRINCIPAL YVONNE JONES

Plaintiff failed to meet the second prong of Kneipp, willful disregard, in her claim against Jones. As discussed supra, willful disregard requires a "willingness to ignore a foreseeable danger or risk" on the part of the defendant. 132 F.3d at 910. Plaintiff admits in his response to the motion for summary judgment that Principal Yvonne Jones took affirmative steps to address the safety problems at Overbrook by requesting additional security from the school board. In light of this acknowledgment, there is no dispute of material fact as to whether Jones's conduct constituted a willingness to ignore danger to Overbrook students or consequently whether her behavior exhibited willful disregard or shocked the conscience. Hence, this Court grants the motion for summary judgment as to the claim against Jones.

d. SUPERINTENDENT DAVID HORNBECK

In his claim against Superintendent David Hornbeck, Plaintiff fails to meet his burden with respect to the fourth prong of the Kneipp test, and therefore, summary judgment is appropriate. As discussed supra, Plaintiff must

demonstrate that the defendant's behavior created the opportunity for Plaintiff's injury. Plaintiff attempts to satisfy this requirement by contending that Hornbeck was aware of the violent conditions at Overbrook and failed to cure them. This failure, Plaintiff asserts, constituted willful disregard of the risk posed to Plaintiff.

To support this claim, however, Plaintiff only offers statistics and information documenting the escalation of violence at Overbrook and Hornbeck's testimony acknowledging this situation. Plaintiff provides no evidence linking the existence of violence or its alleged increase at Overbrook to Hornbeck's behavior. Moreover, Plaintiff's speculation about training methods and procedures that might have decreased the risk to Plaintiff are not sufficient to survive a motion for summary judgment. Therefore, Plaintiff failed to satisfy the fourth prong of Kneipp, and this Court grants the motion for summary judgment as to the claim against Hornbeck.

e. **QUALIFIED IMMUNITY**

Defendants raised the affirmative defense of qualified immunity as to their liability in this situation. However, as Plaintiff has failed to satisfy the Kneipp test for any of the individual defendants, the Court finds no need to address the issue of immunity.

IV. **CONCLUSION**

For the foregoing reasons, summary judgment is granted to School District in its municipal capacity as to the special relationship claim and in part as to the policy, custom and practice claim. Summary judgment is also granted to the individual defendants in their official capacities.

Summary judgment is denied as to municipal liability under the state-created danger theory and as to inadequacy of training under the policy, custom and practice claim.

An appropriate Order follows.

[1] The Supreme Court established that in claims against state actors, the relevant conduct must "shock[s] the conscience." See Lewis, 523 U.S. at 848-49. However, determining whether a particular behavior shocks the conscience will vary depending on the circumstances. Where there is greater opportunity for deliberation, the requisite degree of the conduct diminishes and standards such as "deliberate indifference" are appropriate. See Cannon v. City of Philadelphia, 86 F.Supp.2d 460, 467-70 (E.D.Pa. 2000).

Plaintiff contends that Defendants were aware of the potentially dangerous conditions in the high school as well as the risks posed by alleged troublemakers such as the assailants in this case. Viewing the facts in a light most favorable to Plaintiff, the Court assumes that defendants had ample opportunity to deliberate and address these risks, making "deliberate indifference" the appropriate standard of liability.

[2] As the Third Circuit explained in Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994)(Fagan II), claims against a municipality require different degrees of proof, different mental states, and therefore, a different degree of liability than claims against an individual defendant who is acting in an official capacity. Behavior in claims against individuals in their official capacities must "shock the conscience."

[3] This standard differs from the deliberate indifference standard that was appropriate in evaluating the municipality's actions. See supra N.1.